

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEFFREY ROGERS)	
Claimant)	
V.S.)	
)	
ALLEN DRILLING COMPANY)	Docket No. 219,800
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	
)	

ORDER

Respondent and its insurance carrier appealed the Award dated June 2, 1998, entered by Assistant Director David A. Shufelt. The Appeals Board heard oral argument on January 27, 1999.

APPEARANCES

Steven L. Brooks of Liberal, Kansas, appeared for the claimant. Terry J. Malone of Dodge City, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

While working on a generator, claimant's hands were pulled into it and severely injured. This is a claim for that November 14, 1996 accident. After finding that claimant had a 87 percent tasks loss and an 88 percent wage loss, the Assistant Director awarded claimant an 87.5 percent permanent partial general disability.

Respondent and its insurance carrier contend the Assistant Director erred by not considering the opinions provided by vocational rehabilitation counselor Karen Crist Terrill. They argue that Ms. Terrill's testimony establishes that Dr. Melhorn, the doctor who provided the tasks loss opinion, did not have sufficient knowledge of claimant's work or knowledge how to formulate the work tasks to be able to provide an opinion.

Conversely, claimant contends that he is permanently and totally disabled.

The only issue before the Board on this appeal is the nature and extent of disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

- (1) On November 14, 1996, Mr. Rogers injured his hands when they were caught in a generator that he was repairing. The parties stipulated that the accident arose out of and in the course of employment with Allen Drilling Company, an oil well drilling company.
- (2) As a result of the accident, Mr. Rogers sustained a crush injury with an open fracture on the right hand and ulnar nerve carpal tunnel entrapment symptoms on the left hand.
- (3) Board certified orthopedic surgeon J. Mark Melhorn, M.D., treated Mr. Rogers with surgery. The doctor eventually released him to return to work with restrictions that he limit his frequent lifting and carrying to 20 pounds and never lift over 35 pounds. The parties stipulated that Mr. Rogers had a 19 percent whole body functional impairment as a result of the work related injury.
- (4) At the regular hearing, Mr. Rogers identified a tasks list that accurately itemized the work tasks that he had performed in the 15-year period before the accident. Dr. Melhorn reviewed that tasks list and identified only three of the twenty-two tasks that Mr. Rogers retained the ability to perform. The Appeals Board affirms the Assistant Director's finding that Mr. Rogers has an 87 percent tasks loss.
- (5) Mr. Rogers put forth a good faith effort to find work. But despite those efforts, he was only able to find a part-time job at a tavern earning approximately \$80 per week. The parties stipulated that Mr. Rogers' average weekly wage on the date of accident was \$616.52. The Appeals Board affirms the Assistant Director's finding that Mr. Rogers has an 88 percent difference in his pre- and post-injury wages.
- (6) The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

The Award should be affirmed.

(1) Because his is an “unscheduled” injury, Mr. Rogers’ permanent partial general disability is determined by averaging the percentage of tasks loss and the percentage difference between pre- and post-injury wages. K.S.A. 1996 Supp. 44-510e provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Fouk¹ and Copeland.² In Fouk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker’s post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(2) Here, Mr. Rogers has made a good faith effort to find appropriate employment. Therefore, the actual wage loss should be used to compute the wage loss prong in the permanent partial disability formula.

(3) Averaging the 87 percent tasks loss with the 88 percent wage difference produces an 87.5 percent permanent partial general disability.

(4) Allen Drilling and its insurance carrier argue that Dr. Melhorn did not have a proper understanding of Mr. Rogers’ work or how work tasks are to be formulated in order to provide a valid opinion. In their brief to the Appeals Board, they argue that Dr. Melhorn did not (1) contact Mr. Rogers’ past employers to verify the descriptions of the work tasks, (2) know which work tasks were essential, and (3) know which tasks should be combined and which should be further broken down into multiple tasks.

¹Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

²Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The Appeals Board disagrees with the contention that Dr. Melhorn's tasks loss opinion should not be considered. As required by statute, the tasks loss must be established by a physician. The doctor is not required to compile the tasks list or verify its accuracy. Neither is the doctor required to determine which tasks are significant or which should be combined or further broken down. Assuming the tasks list is already in evidence and identified as accurate, the doctor's only duty is to consider the work tasks described and provide an opinion whether the worker can or cannot perform each individual task. By making physicians responsible for providing tasks loss opinions, the Legislature did not intend that those physicians are also required to be experts in vocational analysis and, thus, experts in breaking jobs down into individual tasks. The alleged deficiencies in Dr. Melhorn's analysis goes to the weight that the opinion should be given and not to whether it should be admitted.

(5) Mr. Rogers contends that he is permanently and totally disabled from engaging in any substantial and gainful employment. The Appeals Board finds that the record fails to support that conclusion. Although he has sustained severe injuries, Ms. Terrill's testimony is uncontroverted that Mr. Rogers retains the ability to perform work that is available in the open labor market and earn a gainful wage.

AWARD

WHEREFORE, the Appeals Board affirms the Award dated June 2, 1998, entered by Assistant Director David A. Shufelt.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven L. Brooks, Liberal, KS
Terry J. Malone, Dodge City, KS
David A. Shufelt, Assistant Director
Philip S. Harness, Director